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# NOTES.

WASTE COMMITTED BY STRANGER.—In the recent case of *Rogers* v. *Atlantic, Gulf & Pacific Co.* (1915) 213 N. Y. 246, a life tenant sued for the defendant's negligence in setting fire to the premises. The plaintiff argued that since he was responsible to the remainderman for the defendant's wrongful act, he should recover not only for the injury to his life estate, but also for the damage to the inheritance. The court rejected this argument, but held, on other grounds, that he was entitled to all the damages claimed. The decision involves two questions: (1) is a tenant for life or years liable for waste committed by a stranger; and (2) what damages can he recover from such a stranger?

It is frequently said that under the old common law, tenants in dower and by curtesy were liable for waste, but tenants for life or

years were not;[1] the distinction being that the estates of the former were created by the law, which therefore gave a remedy against them, whereas the interests of the latter were created by the owner in fee, who should have reserved a remedy. Since the Statute of Marlbridge and the Statute of Gloucester, however, enacted in 1267 and 1278 respectively, it is certain that tenants for life and years have been punishable for waste,[2] and the only difficult question has been to determine what injuries to the inheritance constitute waste. That they are responsible for voluntary acts of destruction committed by themselves, or their agents, goes without saying. Furthermore, they were formerly liable for any deterioration in the premises due to decay, neglect, accident, or, despite the assertion in the principal case to the contrary, even for the wilful or negligent wrongdoing of a stranger.[3] In fact, the tenant was a virtual insurer of the lands intrusted to him, save against the act of God and the public enemy. His position was analogous to that of the common carrier and the innkeeper, and for similar reasons of public policy.[4] But his situation was destined to improve. The Statute of 6 Anne, c. 31, removed the severe penalties of the common law against persons on whose property a fire started; it gradually became recognized that tenants were liable only for such waste as resulted from their own default;[5] and to-day, it has come to be doubted whether they are liable at all for permissive waste.[6] Nevertheless, the idea is still widespread, and is supported by decisions, that injuries resulting from the wrongdoing of a stranger constitute waste,[7] despite the fact that the reasons for this unjust rule have long since disappeared,[8] and that it is inconsistent with the more lenient doctrines of to-day.

As regards the tenant's rights against the wrongdoer, it is well

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[1]See Green *v* Cole (1671) 2 Saund. 252, note 7; Moore *v.* Townshend (1869) 33 N. J. L. 284, 300; but see article by Prof. G. W. Kirchwey, in 8 Columbia Law Rev., 425.

[2]See Sampson *v.* Grogan (1899) 21 R. I. 174.

[3]Prof. Kirchwey, 8 Columbia Law Rev., 435-437.

[4]See Attersoll *v.* Stevens (1808) 1 Taunt. *183, *196.

[5]Sampson *v.* Grogan, *supra*; Earle *v.* Arbogast & Bastion (1897) 180 Pa. 409; Prof. Kirchwey, 8 Columbia Law Rev., 623-627.

[6]Not liable, *In re* Cartwright (1889) L. R. 41 Ch. Div. 532; *contra*, Moore *v.* Townshend, *supra*. See Williams, Real Property (22nd ed.) 520, note; Prof. Kirchwey, 8 Columbia Law Rev., 631-635.

[7]Mason *v.* Stiles (1855) 21 Mo. 374; Fay *v.* Brewer (Mass. 1825) 3 Pick. 203; Powell *v.* Dayton, etc. R. R. (1888) 16 Ore. 33; Consolidated Coal Co. *v.* Savitz (1894) 57 Ill. App. 659; see White *v.* Wagner (Md. 1818) 4 Har. & J. 373; Baker *v.* Hart (1890) 123 N. Y. 470, 473.

[8]Coke's reason, that otherwise the reversioner would be without redress as the outstanding leasehold barred his right to sue the stranger, is without force to-day now that the restriction on the reversioner's right to sue has been removed. See Rupel *v.* Ohio Oil Co. (1911) 176 Ind. 4, 10; 4 Sutherland, Damages (3rd ed.) § 1012. And the other reason, that the tenant, being on the premises, was presumed to know of and collude in the act of the stranger, whereas the landlord might not discover the injury until too late to punish the wrongdoer, see Attersoll *v.* Stevens, *supra*, *202, loses its weight in these more settled times. Furthermore, where the stranger burns a building, the principal case points out that to hold the tenant responsible violates the present rule exempting him from liability for fire not caused by his default.

settled that he can recover for all injuries to his possession, and that the landlord has a separate right of action for the injury to the inheritance.[9] But is there any theory on which the tenant can recover all these damages in one suit? In allowing such recovery, the courts usually go on the ground that the wrongdoer's act has rendered the tenant liable to the landlord for waste.[10] The existence of such liability is denied in the principal case, but we see that it has been enforced at times despite its injustice, and that it is the usual ground for recovery is evidenced by cases which deny recovery to tenants who are not so liable, such as tenants at will.[11] If this theory be logically carried out, it is evident that the tenant's right to damages for injury to the inheritance does not accrue until his liability to the reversioner has been enforced, and the extent of his injury ascertained. His position is analogous to that of a surety; and just as the surety's right to indemnity does not accrue until his liability for his principal's debt has been enforced, so the tenant's right should not accrue until his liability has likewise been enforced.[12] Most courts have overlooked this fact, and have relied on arguments of convenience alone in deciding the question. On the one hand, it is argued that to give this right to the tenant practically deprives the landlord of his remedy against the wrongdoer, and leaves him only his remedy against the tenant, who may be irresponsible, since a recovery by an insolvent tenant will bar the landlord's right, and so will the defeat of the tenant's action by a defense which would not have been good against the reversioner.[13] On the other hand, it is argued that the contrary rule may render the tenant's cause of action against the wrongdoer ineffective through delay, where the remainderman is an infant, or contingent and not yet ascertained, or where he delays in enforcing the tenant's liability.[14] The principal case manages to allow a recovery of the entire damages by the tenant, and yet avoid all of the above difficulties, by rejecting the whole doctrine that tenants are liable for the acts of strangers, and by drawing an analogy from the law of bailments, which permits a bailee, though not liable to the bailor, to recover from a third party who wrongfully injures the subject of bailment. What the bailee recovers, he holds as trustee for the bailor; and his recovery bars an action by the bailor. The analogy between a tenant and a bailee has been noticed before,[15] and the only fault to be found with it is the historical fact that the tenant's right really arose out of his liability to the reversioner, whereas the bailee's right is said to find its origin in the importance imputed in early times to the fact of possession.[16]

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[9]See Rupel *v.* Ohio Oil Co., *supra*; 4 Sutherland, Damages (3rd ed.) § 1012.

[10]See Austin *v.* Hudson River R. R. (1862) 25 N. Y. 334; Cargill *v.* Sewall (1841) 19 Me. 288; Moeckel *v.* Cross & Co. (1906) 190 Mass. 280.

[11]Coale *v.* Hannibal etc. R. R. (1875) 60 Mo. 227, 233. A tenant at will is liable for voluntary, but not for permissive, waste. Harnett *v.* Maitland (1847) 16 M. & W. 256; Lothrop *v.* Thayer (1885) 138 Mass. 466.

[12]California Dry-Dock Co. *v.* Armstrong (C. C. 1883) 17 Fed. 216.

[13]See Wood *v.* Griffin (1865) 46 N. H. 230; Nashville, etc. R. R. *v.* Heikens (1903) 112 Tenn. 378.

[14]Dix *v.* Jaquay (N. Y. 1904) 94 App. Div. 554.

[15]See Anthony *v.* New York etc. R. R. (1894) 162 Mass. 60, 65.

[16]2 Tiffany, Landlord & Tenant, 2105; Holmes, Common Law, 166.

But there is eminent authority for the view that the bailee's right also depended originally on a liability to the bailor which has since disappeared;[17] and if this be true, the analogy between the tenant and bailee is perfect.

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RENTS, PROFITS AND INTEREST IN SPECIFIC PERFORMANCE.—The sealing of a contract for the sale of land is sometimes said to work a conversion so as to pass the equitable title to the vendee, vesting in the vendor the ownership in equity of the purchase money.[1] The inaccuracy of such a statement is evident from the fact, among others, that intermediate the making of the contract and the date for performance, the rents, issues, and profits, go to the vendor.[2] If the conversion occurred by virtue of the sealing of the contract, the vendee, having the equitable title to the land, seems entitled to the rents and profits, and the vendor should have interest on the purchase money. But although land has always been considered the proper subject of a trust, courts have never gone to the extent of treating purchase money as a *res*.[3] As a matter of fact, therefore, the vendor does not own the purchase money either in law or in equity, and is not entitled to interest until after the date for performance;[4] and, on the theory that it would be most inequitable to allow the vendee not only the interest on his money, but also the rents and profits of the land, the vendor may retain the rents and profits until the time for performance.[5]

After the date for performance, or after performance, the rights of the parties are reversed. Inasmuch as equity will not permit the vendor to profit by his own default, the vendee becomes entitled to the rents and profits of the land after the date for performance,[6] and

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[17]2 Pollock & Maitland, History of English Law, 170-172.

[1]Seton *v.* Slade (1802) 7 Ves. Jr. *265, *274; Lysaght *v.* Edwards (1876) L. R. 2 Ch. Div. 499, 507.

[2]Lumsden *v.* Fraser (1841) 12 Sim. 263. For a discussion of the incidents and a criticism of the theory of equitable conversion, see article by Prof. H. F. Stone entitled "Equitable Conversion by Contract", 13 Columbia Law Rev., 369.

[3]The right of the vendor to specific performance has been said to rest on some theory of mutuality; but it is really based on the equitable rights and obligations of the parties. The vendor holds the property as security for the purchase price, somewhat as a mortgagee, and as he is subject to similar restrictions and liabilities, he is given corresponding rights. As equity does not consider time of the essence, it allows specific performance by the vendee after the date for performance. In order to give the vendor power to cut off this right, he may bring his bill for specific performance, which is analogous to the mortgagee's bill for foreclosure. J. B. Ames, 3 Columbia Law Rev., 1, 12. His right has never been based on the theory that he was enforcing a trust. See Jones *v.* Newhall (1874) 115 Mass. 244.

[4]Minard *v.* Beans (1870) 64 Pa. 411.

[5]Lumsden *v.* Fraser, *supra*.

[6]Phillips *v.* Sylvester (1872) L. R. 8 Ch. App. 173; see Davy *v.* Barber (1742) 2 Atk. *489; Bostwick *v.* Beach (1886) 103 N. Y. 414, 423. If the vendor resumes possession of the premises, he must pay an occupation rent to the vendee; Peck *v.* Ashurst (1895) 108 Ala. 429; likewise, if he retains possession; Dyer *v.* Hargrave (1805) 10 Ves. Jr. *505; but not where the vendee is wilfully in default. Leggott *v.* Metropolitan Ry.